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Analytical Report 2017

“Fraud and mutual cooperation”

Questionnaire for FreSsco national experts

I. INTRODUCTION

One of the objectives of the coordination Regulations is to ensure the effective and efficient allocation of social security benefits to insured persons in a cross-border situation, minimising the risk of overlapping entitlements and ensuring that national conditions of entitlement are observed. For that reason, Regulations (EC) No 883/2004 and (EC) No 987/2009 are based on the principle of good administration through an enhanced cooperation between the institutions of the Member States. including provisions on mutual assistance as well as the necessary legal bases for the exchange of personal data. In addition, a number of other instruments are in force, providing mechanisms for a Member State to exchange information, seek the collection of admissible evidence in criminal matters in a cross-border context and strengthen cooperation between judicial, police and customs authorities including in matters of investigation, detention, extradition, enforcement and recovery.

The objective of this report is to examine the interaction between different instruments in EU law concerning cross-border exchanges of information, the collection of admissible evidence in criminal matters and cooperation between judicial, police and national authorities including in matters of detention, extradition, enforcement and recovery so far as this concerns cross-border social security fraud or error. In considering these interactions the objective is not only to take into account the goal of combatting cross-border fraud and crime but also the need to uphold the rights of the suspect.

In the questionnaire below, several scenarios are described where cooperation is required to find out whether or not there is a risk of fraud and error. For each scenario, some questions are asked. In addition, the questionnaire contains some general questions allowing to find out which steps social security institutions/inspection services follow to tackle possible cases of cross-border fraud and error and to guarantee enforcement.

The deadline for providing the replies is **15 August 2017**.

Please use this template and send the reply to fressco@ugent.be.

II. QUESTIONNAIRE

A) A haulage company based in Country A, which has comparatively high wages, taxes, contributions and employment standards, transfers the responsibility for the employment of its drivers to an intermediate company in Country B, which has lower taxes and social security contributions, and employment and health and safety standards. The drivers have never worked in or visited Country B, and in practice continue to work as they previously did, for the haulage company in Country A. However, under the new arrangement the intermediate company in Country B becomes the drivers' employer and invoices its client, i.e. the haulage company in Country A, for the supply of the drivers' services, thus removing the labour contract relationship between the haulage company in Country A and the drivers, reducing the drivers' rights as well as trade union support.

Questions:

- a) If your country were country A in this scenario, what approach would your country take to this practice?

If there is work performed in the Netherlands, Dutch labour laws are applicable like the Minimum Wage Act, the Working Time Act, the Health and Safety at Work Act, the Temporary Work Agency Act and the Foreign Labour Act. The Labour Inspectorate is competent for controlling compliance with these acts. The Labour Inspectorate can investigate if there is a so-called 'sham employment arrangement' meant to avoid adhering to Dutch labour laws. These investigations can include the verification of the factual work performed and the factual employment relationship. In the case at hand the investigations would need to verify whether the drivers would factually be in an employment relationship with employer A instead of employer B.

For the insurance obligations it is the country of residence (A?) of the workers that has to make the first assessment on the determination of the applicable social security legislation. This involves a research on the working pattern to find out if the persons are still working for a substantial part of their time (25%) in country A, the country of residence. If this is the case then the persons would remain insured in country A. For example for their pension rights and state medical insurance.

If the persons are not working substantially in their country of residence and are working in two or more member states (transport), they are insured in the country where the company is situated that employs the persons. This is hard to determine both on the criteria of establishment of the company as well as the bond of employment. In this regard, fact finding is difficult. Data can be gathered from the company in country A and B, the employee and the competent institution in country B. If the companies don't provide the demanded data, this could involve legal actions which cost a lot of time and effort. The competent institution in country A will make a decision (AI) on the applicable legislation and communicate this to country B and other involved countries. If in the meantime

contributions have been paid in another country, they can be refunded (depending on national law). If benefits and care have already been provided they must be refunded as well. This is a difficult process. Alternative: The wrongfully paid contributions in the past can be legalised via an art. 16 agreement between the competent institutions.

- b) If your country were country B in this scenario, what approach would your country take to this practice?

Country B would probably not notice these situations unless country A or another country of residence of the workers would ask for information or send an AI or preliminary AI. This AI could state that country B is the competent country for the applicable legislation. If country A asks for information or sends an AI that states country A is competent that this is a signal to investigate the situation. Especially if contributions are being paid in country B. Country B has the same possibilities and difficulties of fact finding as stated in situation A.

- B)** An international logistics company has commissioned a subcontractor in Country A to deliver parcels. The subcontractor does not deliver any of the parcels themselves, but instead commissions several workers from another EU Member State living in Country A to make the deliveries. A condition of being given the work is that the delivery drivers establish themselves as self-employed. Another condition is that they stay in lodging provided by the contracting company, which is substandard but for which excessive amounts are deducted from their wages. Wage payments are often late and, even after deductions for their accommodation, incomplete. At a point when wages have been unpaid for several weeks the contractor declares itself bankrupt.

Questions:

- a) What approach does your country take to these practices?

The Dutch Labour Inspectorate has policies on going after notorious offenders. These are for example persistent offenders or employers that violate labour laws and then deliberately let the company go bankrupt to prevent fines and rebates. For example, the Labour Inspectorate may, under circumstances, fine the natural person (factual supervisor) under whose supervision the violation took place. When dealing with notorious offenders, it is also important to investigate and crack down on the people behind companies that are deliberately going bankrupt. For example, if they start a new business, actions can be taken immediately. When fines are collected, measures such as seizure of property are also applied to address these phenomena.

- b) Do the “self-employed” subcontractors have any means of redress?

Yes, they can go to court and claim to be in an employment relationship. If somebody works for somebody else for a certain amount of hours within a certain period he is assumed to be employed. It is then up to the alleged employer to prove that this is not the case. Though

this can happen in theory, in practice it doesn't. There are barely any self-employed subcontractors that claim to be employed.

- C) Following the death of her partner, Mrs A, who has a retirement pension from Country A, retires to a warmer climate in Europe (Country B). After enjoying a new lease of life and several happy years of retirement, she dies. Her son is her executor and with the distress of his bereavement and all the work of having to take care of his mother's affairs in another country and at the same time his own young family at home he forgets to notify his mother's pension provider of her death.

Questions:

- a) If you are Country A what arrangements are in place in your country to identify when a person who is in receipt of a pension has died if they are living in another EU Member State?

In the Netherlands there are several arrangements in place in order to avoid the unduly payment of state pensions in cross-border situations, due to the decease of the foreign beneficiary. These arrangements will be listed and described below.

Legal notification obligation

In the first place, a legal notification obligation is in place. Since particular facts and circumstances may have an influence on the entitlement to pension benefits, this notification obligation constitutes a legal obligation for the pensioner, his spouse or – as in the case mentioned above – the legal representative (being the son as the executor of his mother's estate) to inform the SVB, on request or immediately on his own initiative, about all facts and circumstances of which it should be reasonably clear to him that these facts and circumstances may have an effect on the entitlement to the pension benefits, the amount of the pension benefits or the benefits already paid. One of the circumstances falling under this obligation is death of the foreign beneficiary.

However, about some changes in facts and circumstances, the SVB is notified by other institutions, e.g. municipalities. Therefore, the SVB is in principle not allowed to request the beneficiary to provide this information, in case this information can be obtained via the Municipal Database, policy administration or administrations designated in or pursuant to a general administrative order.

In the context of international mutual cooperation, it should be noted that notifications to foreign authorities are equated to notifications to the SVB, if the person obliged to report resides in a state that agreed with the Netherlands that requests and statements can be provided to the similar authorities in that foreign state. If the person concerned fails to indicate that the notification is intended for the SVB, in principle a violation will be assumed in case the notification does not reach the SVB (in time).

Life certificates

As foreign Municipal Databases or other competent authorities do not inform the Dutch SVB about the decease of the foreign pension beneficiary, beneficiaries living abroad

receiving a Dutch state pension, are obliged to annually provide the SVB with an authenticated life certificate. This obligation does not apply if the Social Security Bank (automatically) receives these facts and circumstances – such as decease of the foreign pension beneficiary - from any municipal/public administration or public register. In the case of Dutch national beneficiaries, the Social Security Bank (SVB) receives this information from Dutch municipal/public administrations and public registers. On the other side, the SVB does not receive these facts and circumstances from foreign administrations and registers and therefore beneficiaries residing abroad are obliged to inform the SVB about their move abroad.

International exchange of social security information between the Netherlands and Germany

Between Germany and several other EU/EER Member States international exchange of information on decease of the foreign beneficiary has been established. Currently, Germany exchanges this information with nine Member States through electronic procedures, under which the Netherlands and Belgium. The German *Rentenservice* - being part of *Deutsche Post AG* - has been appointed as the cooperation partner in this international exchange procedure. In all circumstances, the foreign beneficiary stays legally responsible to inform *Deutsche Post AG* immediately of all factual and legal alterations that can be relevant for the payment of his benefits. The aforementioned appointment of *Deutsche Post AG* on the basis of par. 119 SGB VI also means that this organ is responsible for setting up a cross-border cooperation network in the field of cross-border information exchange.

The foregoing means that the decease of a Dutch pensioner receiving his Dutch pension in Germany, will be immediately forwarded to the Dutch social security office (SVB) which will subsequently immediately terminate the export of the Dutch state pension and thus avoiding the unduly payment of Dutch state pension benefits. The same applies to the case vice versa, i.e. a German pensioner living in the Netherlands and receiving a German state pension.

International exchange of social security information between the Netherlands and Belgium

In Belgium the *Federale Pensioendienst* (hereafter referred to as FPD) internationally exchanges data on decease of the beneficiaries. This international exchange of data is based on bilateral agreements between states. Currently, such bilateral agreements have been concluded with i.a. the German *Rentenversicherung* (concluded in 2011 and in force since 2015) and the Dutch *Sociale Verzekeringsbank* (concluded in 2011 and in force since 2016). The FPD exchanges this data on decease on a three monthly basis with the Dutch *Sociale Verzekeringsbank* and on a monthly basis with the German *Rentenversicherung*.

Since June 2015 Germany and the Netherlands inform the Belgian *Rijksdienst voor Pensioenen* about the decease of their nationals with Belgian pension rights and pension benefits. The foregoing means that the decease of a Dutch pensioner receiving a Belgian pension in the Netherlands, will be immediately forwarded to the Belgian social security office which will subsequently immediately terminate the export of the Belgian state pension and thus avoiding the unduly payment of pension benefits.

Agreements between the SVB and banks on the recovery of unduly paid pensions

The SVB has an agreement with its bankers who contact the receiving banks so that the pensions can be refunded if the receiving bank is aware that the recipient of a payment has died. The SVB has a data exchange with some countries to cover the risk of client death.

- b) If you are Country A what arrangements are in place to recover an overpaid pension when the deceased has been living in another EU Member State?

The SVB recovers overpaid pensions by requesting the overpayment be paid back by the heir(s). If the heir(s) refuse, then the SVB can take legal action.

The Dutch legislative framework comprises several rules regarding the recovery of overpaid state pensions. According to article 24 AOW the Dutch *Sociale Verzekeringsbank* is obliged and empowered to recover unduly paid pension benefits.

Administrative recovery procedure

The administrative recovery procedure applies in case an amount of, during the life of the pension beneficiary, unduly paid pension is recovered from the beneficiary himself or the heirs or the beneficiary's partner. This procedure applies to; for instance, unduly paid supplementary partner allowances or overpaid pensions due to concealed higher other income sources. Assuming that the case under C does not fall under such situations, the administrative recovery procedure will not be discussed any further.

Civil recovery procedure

If the pension payment is continued after disease of the beneficiary, the administrative recovery procedure is not applicable since a precondition for this procedure is the existence of a relationship between the SVB and the beneficiary which relationship is missing when the foreign beneficiary deceased. In Dutch case law it is stated that in such cases the SVB is empowered to recover the unduly paid pension on the basis of recovery of unduly payment in civil law. In that case, the unduly paid pension is recovered to the extent that the unduly paid benefits cannot be settled with the death benefits already paid.

For the recovery of unduly paid AOW pensions the deadlines laid down in civil law shall apply. Pursuant to this article the unduly payment can be recovered within a time period of twenty years after the unduly payment, provided that the SVB issued a recovery decision within five years after she has become known with the unduly payment.

In the context of international mutual cooperation between social security institutions it should be stressed that the recovery decision under the civil procedure does not qualify as a decree in terms of administrative law which in turn can lead to a lack of mutual cooperation and assistance in case of cross-border recovery under articles 75, 77 and 78 of Regulation 987/2009.

- c) If you are Country B what arrangements are in place to identify, when a person dies, whether they are in receipt of a pension from another EU Member State, and what action is taken?

When a pensioner dies in the Netherlands the SVB is electronically informed by the municipality where the person was registered in the population registry. If the SVB knows that the person was in receipt of a pension from a Member State the SVB will inform the other Member State.

International exchange of information and monitoring

Under the newly developed system of international exchange of information between social security offices of the Member States, also information on the entitlement of foreign nationals to foreign pension benefits will be registered and monitored. For instance, since June 2015 Germany and the Netherlands inform the Belgian *Rijksdienst voor Pensioenen* about the decease of their nationals with Belgian pension rights and pension benefits. From this, it can be deduced that the Netherlands already identified the entitlement of the Dutch national, residing in the Netherlands, to Belgian pension benefits. Subsequently, life and death of the Dutch national in the Netherlands are monitored.

If we assume that Belgium takes the place of country B, the following example can be given. The decease of a Dutch pensioner receiving a Belgian pension in the Netherlands, will be immediately forwarded to the Belgian social security office which will subsequently immediately terminate the export of the Belgian state pension and thus avoid the undue payment of Belgian pension benefits.

- D)** After a long and happy marriage Mrs A is widowed. She decides to retire with her friend in another EU Member State. Her friend has a full working biography and contribution record giving entitlement to a full contributory state pension which is exportable under EU Regulations. However, Mrs A has a fragmented working biography having taken time away from paid employment to raise her three children and more time later to take care of her husband's aging father and again to nurse her husband when he became sick, and so she does not qualify for a full contributory state pension. However, she is entitled to a mean-tested pension which is classified under EU Regulations as a Special Non-Contributory Benefit (SNCB) and not exportable.

Question:

- a) What measures are in place in your country to detect Mrs A enjoying her retirement, while in receipt of a SNCB pension, in another Member State? And what measures are taken if she is detected?

This question is not applicable in the Netherlands. The Netherlands do not have an old-age SNCB pension.

- E)** A person receives unemployment benefits from Member State A and then decides to take up a job in Member State B without reporting it to Member State A while continuing to receive benefits.

Question:

- a) What measures are in place in your country to detect/prevent this from happening? If you are country A? If you are Country B?

Country A: prevention is almost impossible. Detection; in case of a notification from a UWV employee or a third party to our Central Fraud Helpdesk we can start an investigation. In this investigation we can contact the competent organisation of another member state to check if the person is employed; data exchange.

Country B: no measures are in place at UWV. Only in case of an information request from member state A where UWV is asked if the person has any known income in the Netherlands, the UWV can respond.

General questions

1. Which public bodies (agencies, authorities, departments, administrations) are responsible for investigating and sanctioning violations of legal obligations with regard to paying social security contributions or receiving social security benefits?

Social security contributions are levied by the Belastingdienst (Tax authority). The Belastingdienst is also responsible for investigating and sanctioning violations in this respect. The Belastingdienst does this in close cooperation with the SVB (Social security institution for residence based schemes), the UWV (Social security institution for work based schemes), the ISZW (Labour Inspectorate), the ILT (Human Environment and Transport Inspectorate) and foreign tax authorities and social security institutions.

Investigating and sanctioning violations with regard to receiving social security contributions is basically done by three public bodies: the SVB (for example for old age pensions and family benefits), the UWV (for example unemployment benefits and invalidity pensions) and the municipalities (social assistance). In relation to the investigation of fraud and abuse ISZW also plays a role.

2. How are infringements sanctioned: through an administrative, criminal or civil law method? Do you have particular administrative or criminal provisions sanctioning unduly paid social security benefits or the failure to pay social security contributions in due time? Could those violations fall within the scope of more general administrative or criminal law sanctions (e.g. fraud)?

Infringements are primarily sanctioned by means of administrative fines, administrative measures or a written warning. What sanction will be imposed, depends on the type of

infringement and on the type of underlying violated obligation or legal norm. Fraud in social security is tackled by means of a 'tit for tat' policy. Since the implementation of the Law on Fraud since 2013, the amounts of the administrative fines have been raised.

The detailed rules and policy regarding these fines are set out in the Decision on imposing administrative fines in social security legislation. The fining policy shows a strong relation to criminal law since the percentage of the unduly payment that will be imposed as an administrative fine is differentiated depending on whether the infringement is intentional or culpable. For instance, intentional infringements are sanctioned through a 100% fine and culpable infringements are tackled through a 50% fine. However, these fines are still imposed under administrative law. In case of recidivism, the fine may be raised to 150%.

Administrative measures constitute the refusal to (further) pay out the benefits. This refusal can be temporary, permanent, partially or a fully exclusion of the right to the benefits. The policy on these measures is laid down in the Decision on measures in social security legislation and shows broadly resemblance with the fining policy: the type of measure varies according to the nature of the infringement and the underlying violated legal norm.

The SVB is empowered to give a written warning in case the person concerned does not comply with particular legal obligations but he or she fails to (fully) comply (in time) with these obligations, but this has not led to the unduly pay out of benefits. As well as the fine and measure, the written warning qualifies as a decision amenable for object and appeal.

Particular infringements of a severe nature can be sanctioned through criminal law. These infringements may include fraud, violating notification obligations or intentionally providing untruthful information or intentionally withholding information. In this way, social security fraud is tackled by the public prosecutor. Some criminal offences in the field of social security, like falsification of documents or fraudulent practises, may be sanctioned through criminal law leading to a conditional or unconditional sentence or community service, often combined with replacing detention. Further detailed rules on criminal sanctioning of social security fraud are laid down in the Directive on criminal proceedings in social security fraud.

3. Does your country permit the exchange of information between national public institutions (i.e. between social security authorities, fiscal services, police, judicial services etc) or private institutions (e.g. when they are responsible for paying out the benefits)?

Yes, the legal basis for this exchange of information is laid down in the *Wet structuur uitvoeringsorganisatie werk en inkomen* (Work and Income Implementation Structure Act). This Act regulates the exchange of information between national public institutions (Employee insurance schemes agency, the Social Security Office, the Inspectorate on Social Affairs and Employment and municipalities) and private institutions (health insurers). Under certain preconditions, the exchange of information between these national bodies is allowed when set to a certain relevant aim.

4. Is there any legal framework (legal acts, case law etc) regulating cooperation between these institutions?

Yes, the *Wet structuur uitvoeringsorganisatie werk en inkomen* (Work and Income Implementation Structure Act) regulates i.a. the exchange of information between national institutions, the mutual cooperation between these institutions, the supervision and monitoring and the joint service provision. There is also a lot of settled case law on, in particular, the legitimacy of the exchange of information. In addition, for instance, the Ministry of Social Affairs and Employment and the Public Prosecution yearly conclude bilateral agreements on the cooperation in the field of prosecution of social security fraud.

5. Does your country have national databases to support the social security administration in finding and/or exchanging information? Are these databases fed by external sources (i.e. data exchange with other (internal or foreign) public (inspection) authorities)?

The Belastingdienst has a database of companies that need to pay taxes and social security contributions. The SVB has a database with all PD AI's issued and received. The UWV has a database with employers that are possibly committing fraud.

6. Do you exchange information at an international level with other social security institutions? What does this cooperation include (e.g. mutual investigation, data exchange, requesting legal and administrative information, verification of official documents, informal meetings, exchanging personnel etc)?

The SVB exchanges information with foreign institutes as a result of the mutual obligations in the EU coordination law and bilateral agreements. They exchange the E-forms within the EU and similar forms for other bilateral treaties. Furthermore they have established death data exchanges in the field of pensions with several countries such as Germany, Belgium, US and in the near future Spain and Canada.

With most countries outside of the EU they have established additional verification procedures concerning official documents in the field of pension and child allowances. Furthermore they hold regular formal and informal bilateral meetings with foreign pension institutes and institutions in the field of child allowances with the aim of improving the mutual cooperation and to exchange information on changes within the benefits or national structures.

7. Are there any limitations on the exchange of information with foreign social security/labour inspectorates (e.g. due to privacy legislation)?

As well as is regulated in the *Wet structuur uitvoeringsorganisatie werk en inkomen*, the bilateral agreements on the international exchange of social security information contain a provision stating that – in the context of the international exchange of social security information - the exchanging partners are jointly responsible for providing the information in accordance with privacy legislation and the Personal Data Protection Act.

8. Does your country have any bilateral or multilateral agreements or memorandums of understanding on cooperation in the case of transnational social security fraud and error?

Yes, the Netherlands has concluded bilateral enforcement agreements with 51 states in total. These enforcement agreements concern preconditions under which the export of benefits is allowed, e.g. the condition that the foreign institutions cooperate in control and verification measurements (the exchange of data, conducting investigations on request etc). However, not all Dutch social security benefits fall under these agreements.

On the website of the Dutch social security office (SVB) a list has been published of the states the Netherlands has concluded a social security treaty with, besides the EU/EER Member States.¹ The SVB has also set up a website module with which Dutch nationals that have an intention to emigrate can assess to what extent their old age state pension is exportable.² The Dutch old age state pension AOW is, for instance, fully exportable to Germany and Belgium – under the condition that the emigrant continues to fulfil the entitlement requirements – since between the Netherlands and these states treaties have been concluded that contain arrangements on the control of the entitlements to these benefits. This policy on the exportability of social security benefits finds its ground in the *Wet Beperking Export Uitkeringen (Wet BEU)*, the Act on the Restriction on the Payment Abroad of Social Security Benefits).

Furthermore, a series of bilateral agreements were concluded with a number of European Member States in order to improve the cooperation in the fight against fraud in the labour market and social security, like illegal work, abuses in posting of workers, evasion of taxes and contributions. This cooperation includes exchanging information on activities and working methods, designating contact persons, performing joint risk assessments and data comparisons and mutual assistance. These agreements take the form of treaties, MoU's and letters of intent, and have been concluded with Belgium, Germany, the UK, France, Poland, the Czech Republic, Slovakia, Croatia, Bulgaria en Romania.

Thank you very much for your cooperation!

¹ <https://www.svb.nl/int/nl/algemeen/verdragslanden.jsp>.

² https://www.svb.nl/int/nl/aow/wonen_buiten_nederland/beu/index.jsp.